No. 10583

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

IDAHO REFINING COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court upon the petition of the National Labor Relations Board for the enforcement of its order issued against respondent, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*).[1] The Board's decision and order are reported in 47 N. L. R. B. 1127 and are set forth at pages 47–144 of the printed record. The unfair labor practices herein involved occurred in the State of Idaho within this judicial circuit. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act.

[1] The pertinent provisions of the Act are printed in Appendix "A," p. 33, *infra*.

STATEMENT OF THE CASE

Upon charges filed by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. of L. (herein called the Union) and by the International Association of Machinists, Local No. 198, A. F. of L. (herein called the I. A. M.), and upon the consolidated proceedings under Section 10 of the Act, fully set forth in the Board's decision (R. 67–72), the Board, on February 25, 1943, issued its findings of fact, conclusions of law, and order which, briefly summarized, are as follows:[2]

1. *The nature of respondent's business (R. 73–74).*— Respondent, a Nevada corporation with its principal office and place of business at Pocatello, Idaho, is engaged in refining, transporting and distributing petroleum and petroleum products. A substantial portion of the finished products is distributed through respondent's wholly owned and controlled subsidiary, the Covey Gas & Oil Company (R. 201–202), and the respondent-controlled Idaho Gas & Oil Company, with which respondent has several officers, executives, and many stockholders in common (R. 197–199, 203–211, 215–216, 307–308, 996–997). Respondent financed Idaho's operations in the amount of a loan of approximately $295,000 (R. 997).

In 1941 respondent purchased for use in its operations materials and equipment in the amount of

[2] The Board's decision, except as otherwise indicated therein, adopted the findings of fact, conclusions of law, and recommendations contained in the Intermediate Report of the Trial Examiner (R. 48–58).

$1,328,000, of which approximately 90 percent was shipped to respondent from sources outside the State of Idaho. In the same period respondent's gross sales totalled $1,900,000, of which 10 percent was shipped to points outside the State.[3]

2. *The unfair labor practices* (R. 48–58, 75–126).—The Board found that (1) respondent dominated and interfered with the formation and administration of the Idaho Refining Company Employees' Benefit and Labor Association (hereinafter called the Association) and contributed support thereto, and illegally entered into a contract with the Association in violation of Section 8 (2) and (1) of the Act; (2) respondent discriminatorily discharged 20 of its employees because of their Union membership and activity in violation of Section 8 (1) and (3) of the Act; and (3) that

[3] Upon these facts, which are predicated upon undisputed and stipulated evidence (R. 192–197), it is clear that the respondent is subject to the Act. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases; *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509, 571–572 (C. C. A. 5); *N. L. R. B.* v. *Aluminum Products Co.*, 120 F. (2d) 567, 569 (C. C. A. 7). Nor can respondent, upon this statement of the facts (see also pp. 5, 15, *infra*), properly contest the Board's finding (R. 74) that "the relationship between [respondent, Idaho and Covey] is such, and the officials of the respondent have so acted, as to constitute the respondent an 'employer' within the meaning of that term as used in the Act [Section 2 (2) at p. 33, *infra*] of the employees of Covey and Idaho." *N. L. R. B.* v. *Condenser Corp.*, 128 F. (2d) 67, 71–72 (C. C. A. 3); *N. L. R. B.* v. *Swift & Co.*, 127 F. (2d) 30, 32 (C. C. A. 6); *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. (2d) 641, 648–650 (C. A. D. C.); *N. L. R. B.* v. *Lund*, 103 F. (2d) 815, 819 (C. C. A. 8).

respondent by this and other conduct, including the interrogation of its employees as to their Union membership and antiunion threats, interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act.[4]

3. *The Board's order* (R. 61–65).—The Board directed respondent (1) to cease and desist from the unfair labor practices found; (2) to withdraw recognition from and disestablish the Association as a collective bargaining representative of its employees; (3) to cease giving effect to the contract of June 1, 1942, with the Association; (4) to reinstate with back pay certain of the employees discriminated against, hereinafter listed in Appendix "B" at p. 34, *infra;* (5) to award back pay to R. E. Miller[5] for the period he was discriminated against; and (6) to post appropriate notices.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act.

II. The Board's order is valid and proper.

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[4] The Board, reversing the finding of the Trial Examiner (R. 134), dismissed the complaint insofar as it alleged that respondent had refused to bargain collectively with the Union in violation of Section 8 (5) of the Act (R. 57).

[5] Miller, who was found by the Board to have been discriminatorily discharged (R. 48–49, 58), was, subsequent to his discharge, reinstated to his former position as a truck driver (R. 602–604, 918–919).

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the act

A. Respondent's interference with, domination and support of the Association in violation of Section 8 (2) and (1) of the Act

In the fall of 1938, shortly after the refinery at Pocatello, Idaho, was put into operation, an inside organization, the Association, was formed covering the employees of Covey and Idaho, as well as the employees on respondent's payroll (R. 264–268, 385). Association membership was open to and included many of respondent's officials [6] and "practically all" of its top ranking supervisors (R. 267–268, 300–302). In fact, several of respondent's officers and supervisors held office in the Association and actively participated in its administration. Thus, Secretary Webb, Superintendent Val Gaudet, and Rice, the superintendent of truck drivers, attended the Association's organizational meeting (R. 264, 301–302, 306). Thereafter several of respondent's supervisory employees, including Chief Chemist and Assistant Superintendent Farnsworth (R. 981,

[6] The following officials of respondent were included within the Association's membership: Arch Webb, secretary (R. 810–811, 816), and Frank Copening, his successor as secretary (R. 632–633, 637, 980–981), John H. Peterson, treasurer of respondent and president of the Idaho Gas & Oil Co., and his successor in these offices, B. J. Albertson (R. 307–308, 394, 399, 981), and Kermit Rice, superintendent of respondent's truck drivers (R. 398, 862).

400, 401–402), Yard Foreman Victor Simpson (R. 328–329), and Foreman C. E. Henninger (R. 904–905, 931–933) continued to play leading roles in the Association's affairs, revising the Association's by-laws, changing its name (R. 330–332, 401–402), and participating in the elections of the Association's officials (R. 401–402). Indeed, Simpson and Henninger each was elected to the office of Association president (R. 328–329, 925–927, 932–933).[7]

Moreover, aside from respondent's dominant role in the administration of the Association through its executives and supervisory employees, the Association was, from its inception, the recipient of respondent's open support. Respondent not only permitted the Association to distribute notices of the organizational meeting on the plant premises during working hours

[7] Through the acts of its officials and supervisory employees, acts for which respondent is plainly answerable, respondent's role in the formation and adminstration of the Association is clear and unequivocal. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 79–80; *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007 (C. C. A. 9). Such employer participation and control enabling an employer to dictate the policies of an inside organization are among the very evils which Section 8 (2) of the Act is designed to eliminate. As stated by the Report of the Senate Committee in discussing interference proscribed by Section 8 (2) "It exists when [employers] participate in the internal management * * * of a labor organization or when they supervise the agenda or procedure of meetings." Senate Report No. 573, 74th Cong., 1st Sess., p. 10. *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 594 (C. C. A. 9); *N. L. R. B.* v. *Moore-Lowry Flour Mills Co.*, 122 F. (2d) 419, 424 (C. C. A. 10); *N. L. R. B.* v. *Ed Freidrich*, 116 F. (2d) 888, 890 (C. C. A. 5); *New Idea Inc.*, v. *N. L. R. B.*, 117 F. (2d) 517, 523–524 (C. C. A. 7); *Union Drawn Steel Co.* v. *N. L. R. B.*, 109 F. (2d) 587, 591 (C. C. A. 3).

and to post notices on the plant bulletin boards (R. 265), but it allowed the meeting to be held in the refinery office (R. 265). Respondent thereafter permitted the Association to hold all of its meetings on plant premises (R. 271, 325, 330). Association meetings were regularly held in respondent's refinery office until the spring of 1940. Thereafter, meetings were held in the "change room" (bath house), which respondent had constructed at the Association's request, respondent furnishing the materials, and the employees their services (R. 284–285, 329–330).

Respondent did not limit its support to the permitted use of company time and premises, but authorized the Association to maintain soft-drink vending machines and laundry and tobacco concessions on the premises (R. 335–336, 376–382). Payments for purchases from the concessions were provided for in the following manner: Semi-monthly, the Association prepared and submitted to respondent a statement of the amounts due the Association from each employee. Respondent thereupon deducted these amounts from the employees' pay checks and transmitted the total to the Association (R. 381–383, 392–395).

Nor did respondent rely entirely upon the prestige thus given the Association, but shortly after its appearance insured the Association's financial stability by precipitately granting it a check-off of dues (R. 405–408, 982–984),[8] traditionally the last concession

[8] Respondent, through its supervisors and officers who were members of the Association and whose dues were accordingly checked off, thereby made a direct financial contribution to the Association.

which employers have been willing to make in their dealings with genuine labor organizations.[9] Respondent admittedly made no effort to ascertain whether the Association represented a majority of the employees (R. 983–984).

In the same fashion, about June 1, 1941, respondent, without determining whether the Association represented a majority, executed a 1-year contract providing for a wage increase and, in effect, granting the Association exclusive recognition (R. 352–354, 338–342, 984).[10] Shortly before the 1941 contract was to expire respondent executed a new contract for a term of 6 months effective June 1, 1942 (R. 318–324, 344–351, 355–357, 942–943, 974). As in the 1941 negotiations, respondent accepted the Association's assurance that it represented a majority of the employees (R. 984). In marked contrast to respondent's unquestioning acceptance of the Association was its subsequent reaction to the Union's request for collective bargaining rights. Respondent not only demanded that the Union furnish proof to substantiate its claim of a majority (R. 1014), but raising the contract with the

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[9] As Robert R. R. Brooks declared in *When Labor Organizes* (1937) at pp. 13–19, "the average employer's opposition to the checkoff is even more intense than to the closed shop." See *Virginia Electric & Power Co.* v. *N. L. R. B.*, 132 F. (2d) 390, 395 (C. C. A. 4); *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 986 (C. C. A. 7), cert. denied 311 U. S. 662.

[10] Although there was no express provision for recognition in the agreement, the wage provision specifically applied to all of respondent's employees except the truck drivers (R. 352–354), and even they were covered by the terms of the renewal contract (R. 357).

Association as a bar, declared that it "didn't see how [it] could recognize two representatives at the same time" [*ibid.*].

The foregoing summary of the Board's findings of fact amply supports the Board's conclusion that respondent dominated and interfered with the formation and administration of the Association and contributed material support to it in violation of Section 8 (1) and (2) of the Act.[11] As a corollary thereof the contract of June 1, 1942, executed with the Association constitutes an illegal interference with the rights guaranteed employees in Section 7 of the Act in violation of Section 8 (1). *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 364, 366; cf. *N. L. R. B.* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 695.

Respondent attempted to escape the plain implications of its illegal course of conduct by contending at the hearing and before the Board that : (1) a majority of the employees voted at an Association meeting in 1939 to remain within the Association; and

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[11] E. g., *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 76–79; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 517–519; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598–600; *Virginia Electric & Power Co.* v. *N. L. R. B.*, 132 F. (2d) 310, 395 (C. C. A. 4), aff'd 319 U. S. 533; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 593–594 (C. C. A. 9); *N. L. R. B.* v. *Pick Mfg. Co.*, 135 F. (2d) 329, 331–332 (C. C. A. 7); *N. L. R. B.* v. *Greenebaum Tanning Co.*, 110 F. (2d) 984, 986 (C. C. A. 7), cert. denied, 311 U. S. 662; *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 252–253 (C. C. A. 8); *West Virginia Glass Specialty Co.* v. *N. L. R. B.*, 134 F. (2d) 551, 552 (C. C. A. 4), cert. denied, 64 S. Ct. 38.

(2) there was no actual proof of the effect upon the employees of respondent's illegal practices (R. 280, 683, 148–149, pars. 4 and 7). Respondent's first contention is foreclosed by judicial decision. The fact that a company union had a majority of the employees as members was deemed immaterial to the issue of domination by the Supreme Court in *N. L. R. B.* v. *Newport News Shipbuilding and Dry Dock Co.,* 308 U. S. 241 at 248–250. Accord: *Westinghouse Electric & Mfg. Co.* v. *N. L. R. B.,* 312 U. S. 660, aff'g 112 F. (2d) 657, 659, 661 (C. C. A. 2); *N. L. R. B.* v. *Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50, 60; *N. L. R. B.* v. *DeBardeleben,* 135 F. (2d) 13, 17 (C. C. A. 5), enforcing 44 N. L. R. B. 1234. With respect to respondent's second contention, it is equally well established that "if the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere." *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 599; *Virginian Railway* v. *System Federation,* No. 40, 84 F. (2d) 641, 644 (C. C. A. 4), aff'd 300 U. S. 515; *N. L. R. B.* v. *Automotive Maintenance Machinery Co.,* 315 U. S. 282, rev'g 116 F. (2d) 350, 356 (C. C. A. 7); *N. L. R. B.* v. *American Manufacturing Company, Inc.,* 132 F. (2d) 740, 742 (C. C. A. 5), cert. denied 319 U. S. 743; *N. L. R. B.* v. *John Engelhorn & Sons,* 134 F. (2d) 553, 556–557 (C. C. A. 3); *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. (2d) 452, 457 (C. C. A. 7), cert. denied 317 U. S. 650; *N. L. R. B.* v. *Trojan Powder Co.,* 135 F. (2d) 337, 339

(C. C. A. 3), cert. denied 64 S. Ct. 76. Cf. *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. (2d) 368, 376 (C. C. A. 9); *Stonewall Cotton Mills, Inc.* v. *N. L. R. B.,* 129 F. (2d) 629, 631 (C. C. A. 5).

B. Respondent's violations of Section 8 (3) and direct violations of Section 8 (1) of the Act

1. *Respondent's discriminatory discharge of all 18 of the Pocatello drivers*

About the middle of July 1941 respondent's truck drivers at Pocatello, dissatisfied with the wage scale which respondent had promulgated the preceding (month (see p. 8, *supra;* R. 500–501, 511, 617–618), decided to establish an outside union (R. 500–501). Accordingly, the truck drivers requested the assistance of the Union and an intensive membership drive began (R. 415–420), which by the end of October resulted in 18 of respondent's 19 drivers stationed at Pocatello joining the Union (R. 483, 501, 219, 239–258). About November 1, a membership meeting was held and a committee appointed to institute negotiations with respondent (Tr. 487–489).[12]

In the meantime, respondent took counter-steps to block the Union. Thus, early in October, Gilbert Moyle, respondent's general manager (R. 191–192), bluntly warned Loren McBride, a Boise driver who was transferring to Pocatello, that his union button would do him no good at Pocatello, adding that if the

[12] Concurrently with the Union's campaign, the I. A. M. began to organize respondent's truck mechanics (R. 414–415). It was at this time that Leo Archibald, a mechanic at Pocatello whose discriminatory discharge is hereinafter discussed (p. 22, *infra*), joined the I. A. M.

Pocatello drivers joined the Union he would "can every one of them" (R. 619–624, 1076–1078). On November 13, Superintendent Kermit Rice approached James Ayers, a Pocatello driver, and, declaring that he had heard that the drivers had joined the Union, inquired as to the purpose of their unionization (R. 484–485).[13] The next day the Pocatello drivers, having affiliated with the Union despite respondent's open threat to "can" them, were discharged *en masse* (R. 652–653, 953).[14]

The anti-union purpose underlying respondent's mass discharge of the Pocatello drivers is clearly revealed by its overt efforts to replace them with non-union drivers. On November 15, the day after the

[13] In March 1940, Rice, while interviewing Arthur Heckert, an "extra-board" (temporary) driver, inquired whether he belonged to a union. Upon Heckert's reply in the negative, Rice rejoined "that is okeh, Mr. Moyle is strictly against union" (R. 553–554, 562–564).

[14] At the time of the discharge on November 14, the following 18 drivers were stationed at Pocatello (R. 219): James Ayers, S. R. Burkholder, K. C. Brower, Guy E. Campbell, E. B. Cornia, H. L. Davis, Victor Ellingford, John Evans, Leonard Fowler, A. L. Heckert, Henry Henricksen, C. E. Hill, A. S. Merrill, John Ray, Leland Stanford, P. P. Stanger, R. E. Miller, M. D. Whitesides. Although K. C. Brower was not a Union member (R. 493), the Board, as did the Trial Examiner, concluded (R. 53, note 4, 122) that "because of [his] association and employment with the other drivers, the respondent concluded that he too was a Union member and discharged him . . ." *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 589–590 (Novak); *N. L. R. B.* v. *Remington Rand Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2) (McCoy). R. W. Patterson, whose name appears on the list of drivers operating out of Pocatello, was discharged prior to November 14 (R. 493, 986). There is no allegation or finding by the Board that his discharge was discriminatory.

discharge, General Manager Gilbert Moyle asked Trevor Moss, an applicant for employment, whether he was a union member (R. 567–568). Moss replied in the negative, whereupon Moyle advised Moss, "We have our own Union * * * here in the company, which the employees were free to join any time they wanted to." "* * * [respondent] didn't belong to any [outside] union and didn't intend to" (R. 568–569). In similar fashion, Secretary Copening inquired of another applicant, Merlin Bowman, whether he belonged to a union (R. 572–574). In the same vein Superintendent Rice profanely assured one of the replacements that he had "a job as long as [he] went ahead and [did his] work * * * these sons-of-bitches are never going to drive out here again" (Tr. 631–634). Moreover, respondent diligently attempted to insulate the new drivers at Pocatello from all union influences. Thus, when District Manager Stiff (R. 212, 626, 957) instructed the drivers at Baker, Idaho (members of a union, see p. 28, *infra*), in January 1942 that they were to be transferred to Pocatello, he warned that Gilbert Moyle had advised him that they were not to discuss union affairs or associate with the Pocatello drivers "in that capacity" (R. 626–627). Stiff explained that Moyle had experienced "trouble with the laborers in the union capacity" and did not desire a repetition of that experience (R. 627–628).

Respondent's motive in discharging the drivers at Pocatello is further revealed by its threat to repeat this tactic at Boise if necessary. On November 16, 2 days after the mass discharge at Pocatello, W. A.

Sheppard, district manager of respondent's Boise office (R. 468–469), called at the home of Roy Williams, a nonunion driver at Boise (R. 467, 475), and inquired whether two of his fellow drivers, Ray Pittman and Mervin Zollman, were members of a union (R. 472). Williams replied that he had no knowledge concerning their union affiliation (R. 473) and refused Sheppard's urgent request to secure such information (*ibid.*). Sheppard thereupon replied that if the two drivers in question had joined a union he would "use" recent accidents in which they had been involved "as an excuse" for their discharge (*ibid.*).

Further proof of the fact that respondent's discharge of the Pocatello drivers was dictated by its manifest desire to wipe out the focal point of unionization are the frank statements of its supervisory staff in explanation of the discharges. Thus, about March 10, 1942, Foreman Rice advised R. E. Miller[15] that the discharged drivers would "be working now" if, when they had become dissatisfied with their wages, they "had come to the office instead of going uptown" to the Union (R. 605–606). In December 1941, Henninger admitted to Evans, one of the discharged drivers, that since he knew that the "fellows belonged to the Union a long time before [they] were fired" (R. 510), perhaps Evans was right in ascribing the dis-

[15] R. E. Miller, one of the drivers discharged on November 14, 1941, was subsequently rehired as a driver on March 10, 1942, by Foreman Henninger because, as Henninger testified, an important shipment which "had to get * * * delivered" was being held up because "there wasn't any drivers available" (R. 919). Henninger rehired Miller without consulting any of his superiors (*ibid.*).

charge of the Pocatello drivers to their Union affiliation.

Despite the conclusive proof of discrimination herein set forth, respondent contended before the Board that it was compelled to discharge the Pocatello drivers solely because of the cancellation of its accident and liability insurance policy covering its automotive equipment and the necessity for acquiring new insurance. The Board, viewing the mass discharge against the above antiunion background, and carefully considering the facts surrounding the cancellation of the insurance policy, rejected respondent's contention. The Board held that "respondent was opposed to the unionization of the Pocatello drivers and that their Union membership and activities were the motivating cause of their discharge" (R. 53). We submit that a brief résumé of the facts surrounding the cancellation demonstrates the propriety of the Board's holding.

On August 22, 1940, the automotive equipment of respondent (passenger cars, light and heavy gasoline trucks, trailers and semitrailers, R. 761, 1065) as well as the equipment of Idaho and Covey (R. 758), were insured under a 1-year policy issued by the Firemen's Insurance Company of Newark, New Jersey, and the Metropolitan Casualty Insurance Company of New York, both of which are hereinafter referred to as the insurance company (R. 642–643, 645–646, 743–744, 754). A single policy was issued since all 3 corporations "were so closely interwoven" (R. 722, 727). During the term of the policy, from August 1940 to August 1941, the insurance company paid out claims

exceeding 100 percent of the policy's allotted premium (R. 722–723, see also R. 106, footnote 21). Despite the insurance company's reluctance to renew the policy, a new policy was issued on August 22, 1941 (R. 722–725). Respondent's accident record, however, showed no signs of improvement. Between August 22, and November 5, 1941, inclusive, the insurance company paid 13 claims arising out of accidents involving the insured equipment (R. 674–678, 724–725, 749–753, 786–793; see also R. 107, footnote 22). Finally, on November 8, 3 days after one of respondent's drivers, Patterson, was involved in a major accident,[16] the insurance company advised Gilbert Sheets, respondent's president (R. 794–795), that it was compelled to cancel the current policy because of the "frequency of collisions and resulting damage claims" (R. 795, 717). On November 10 the insurance company advised Secretary Copening at Pocatello that the cancellation was to be effective November 17 (R. 646–647, 747, 551–552). On November 13, after a conference between Vice-President Henry Moyle and General Manager Gilbert Moyle at Pocatello, it was decided to discharge only the Pocatello drivers (R. 649–651, 952–953, 1002–1003). The next day all 18 of the Pocatello drivers, including 9 of whom had never been involved in an accident,[17] were summarily discharged.

[16] Patterson, who was forthwith discharged as a result of this accident, was not alleged to have been discriminatorily discharged (R. 493, 986. See p. 12, footnote 14, *supra*).

[17] The discharged drivers who had never had accidents were Ayers (R. 481), Brower, Campbell, Davis, Heckert, Hill, Ray, Stanford, and Miller (R. 509, 558, 602).

Upon the foregoing recital of the facts it is plain, as the Board found (R. 49), that "half of the discharged drivers * * * did not contribute to the loss ratio or accident frequency." Of the 9 drivers involved in accidents only 5 had accidents resulting in claims against the insurance company (See footnote 20.) Moreover, respondent cannot justify its inclusion of 9 efficient and careful drivers among the discharged drivers by claiming as it did before the Board, that the records of the individual drivers were not before the management between November 8, the date it was notified of the impending cancellation, and November 14, the date of the discharge. It is clear from the record, as the Board found (R. 49), that the employment records of the individual drivers were readily available at Pocatello on November 13 when the discharge action was decided upon (R. 650–652, 881–887, 974–975). Nor is respondent's position strengthened by assuming, as it urges,[18] that the discharges were decided upon at

[18] The evidence of respondent's witnesses is conflicting as to where and when respondent determined to make the discharge. President Sheets and Vice-President Henry Moyle testified that they conferred in Salt Lake City on November 12 and made their decision at that time (R. 798–799, 1002). On the other hand, Secretary Copening testified that the decision to discharge the Pocatello drivers was made in Pocatello on November 13 (R. 650–651). Finally, the testimony of Gilbert Moyle concerning the time and place of the discharge contained several inconsistencies. He testified on direct examination that Henry Moyle advised him on November 13 that the decision to discharge the employees had already been made at Salt Lake City (R. 953). On cross-examination he testified that the decision was made in Pocatello (Tr. 1411). Later in his testimony he reverted to his original position (R. 979). The Board's resolution of this conflicting evidence is, of course, conclusive.

Salt Lake City on November 12, since the accident records of respondent's drivers were admittedly available there (R. 796, 1019, 802, 808). Respondent's further contention that it did not have time to effect a segregation of the drivers is patently spurious. Clearly, respondent had an adequate opportunity in the six days between November 8 and 14 to check the records of its drivers.

The speciousness of respondent's several defenses is further laid bare by its argument that in order to acquire new insurance it was compelled to view the Pocatello drivers as a single group. The answer to this contention is, as the Board found (R. 51), that "it is unlikely that any insurance company would have required the respondent to discharge drivers with perfect records and hire new ones whose ability in handling the drivers' equipment had not been tested. On the contrary, it would seem that the incentive to the insurance company's issuance of a policy would have been greater if respondent had discharged only those drivers with accident records." Respondent in its brief before the Board admitted that the insurance company did not suggest the discharge of the Pocatello drivers. Nor, in light of the surrounding evidence, does respondent add to its argument by adverting to a letter dated November 24, 1941, addressed to respondent from a local insurance broker, in which a quotation for new insurance was submitted because respondent had discharged "all drivers" in its employ (R. 768–769). H. F. Benson, who was responsible for the letter, explained that he knew only that respondent had a high loss ratio and

that the accidents were generally due to careless driving (R. 771). He added that he was not advised by respondent that half of the drivers stationed at Pocatello had not been involved in accidents (R. 771). Upon this posture of the facts it is clear why Benson made no distinction between respondent's drivers with accidents and those without.[19] Moreover, Benson revealed that he submitted a bid to insure respondent's equipment upon the representation that the "drivers who have had the accidents had been discharged" (R. 763). Benson further testified that if he knew that "particular drivers" were responsible for a bad loss ratio he would, before submitting a policy, demand only that those drivers be removed (R. 770).

As a matter of fact, not all of the drivers operating equipment covered under the policy were discharged. Indeed, respondent utterly failed to take action with respect to any of its drivers stationed outside of Pocatello, although several of them materially contributed to both the high loss ratio and accident frequency. In comparison with the accident record of the Pocatello drivers, 9 of whom had never been involved in accidents,[20] 7 of the drivers stationed

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[19] Equally unpersuasive is the testimony of Henry Moyle that on November 17, Watkins, the insurance broker, through whom respondent obtained a new policy on that date, advised that he could not have considered issuing a policy to respondent if the drivers had not been discharged (R. 1009). It is clear from the record that Watkins, like Benson, was ignorant of the true state of affairs (R. 781–782).

[20] Not all accidents involving respondent's equipment resulted in claims against the insurance company since the policy limited payment by the insurance company to the amount of "collision" damage to respondent's equipment in excess of $100 (R. 746).

outside of Pocatello had been involved in accidents.[21] Of the 12 drivers who had had accidents resulting in claims against the insurance company, 7 were drivers stationed at points other than Pocatello. (See footnotes 20 and 21.)

In sum: It is clear from the above review of the facts that the cancellation of the insurance policy did not provoke the discharge of the Pocatello drivers but served rather as a shield behind which petitioner carried out its "manifested desire to be rid of employees who [became] union members."[22] *Dannen Grain* v. *N. L. R. B.*, 130 F. (2d) 321, 329 (C. C. A. 8).[23]

The Pocatello drivers who had had accidents upon which the insurance company paid claims and the amount of the claim paid in each case:

Patterson (R. 750)	$625.00
Ellingford (R. 751, 789)	112.50
Henricksen (R. 755)	2,298.53
Whitesides (R. 751–752, 789)	2,094.10
Cornia (R. 755)	2,500.00

[21] Drivers at stations other than Pocatello who had had accidents upon which the insurance company paid claims and the amount of the claim paid in each case were:

Pearson (R. 674)	$1,549.00
Douglas (R. 787–789)	2,068.95
White (R. 750, 751–752)	779.04
Zollman (R. 787)	90.35
Crawshaw (R. 750)	26.45
Walker (R. 792)	25.10
Conrad (R. 786)	7.00

See also p. 14, *supra*.

[22] See discussion of discriminatory discharges of Archibald and Douglas at pp. 22–27 and 27–29, *infra*.

[23] See also *N. L. R. B.* v. *Polson Logging Co.*, 136 F. (2d) 314 (C. C. A. 9); *N. L. R. B.* v. *J. G. Boswell*, 136 F.(2d) 585, 592 (C. C. A. 9); *N. L. R. B.* v. *Condenser Corp.*, 128 F. (2d) 67, 76 (C. C. A. 3); *N. L. R. B.* v. *Algoma Net Co.*, 124 F. (2d) 730, 732 (C. C. A. 7).

"The explanation of the discharge offered by respondent did not stand up under scrutiny. This fact in itself strengthens the inference drawn by the Board from the other facts in the case." *N. L. R. B.* v. *Abbott Worsted Mills,* 127 F. (2d) 438, 440 (C. C. A. 1), that respondent discharged the Pocatello drivers because they persisted, despite respondent's open antagonism, in affiliating with the Union and participating in Union activities. See *Boswell* case, *supra,* at p. 595; *N. L. R. B.* v. *Condenser Corp.,* 128 F. (2d) 67, 75 (C. C. A. 3); *North Carolina Finishing Co.* v. *N. L. R. B.,* 133 F. (2d) 714, 718 (C. C. A. 4), cert. denied 64 S. Ct. 39; *Hickory Chair Mfg. Co.* v. *N. L. R. B.,* 131 F. (2d) 849, 850 (C. C. A. 4); *Firth Carpet Co.* v. *N. L. R. B.,* 129 F. (2d) 633, 635 (C. C. A. 2).

It is equally clear from the above summary of the facts that respondent, aside from the discriminatory character of the discharges in violation of Section 8 (3) and (1), independently interfered with, restrained, and coerced its employees in violation of Section 8 (1). Respondent's conduct featuring threats of discharge, grilling of employees with respect to their union affiliation and attempts to insulate them from Union influences repeatedly has been recognized as violative of Section 8 (1). E. g. *N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 325, 327; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 518; *N. L. R. B.* v. *Hearst,* 102 F. (2d) 658 (C. C. A. 9); *N. L. R. B.* v. *Schaefer-Hitchcock Co.,* 131 F. (2d) 1004, 1007–1008 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,*

118 F. (2d) 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 786 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Rock Hill Printing and Finishing Co.,* 131 F. (2d) 171 (C. C. A. 4); *N. L. R. B.* v. *Cities Service Oil Co.,* 129 F. (2d) 933, 934 (C. C. A. 2). Nor does the First Amendment afford a shield for respondent's conduct. The right of free speech does not include the right to coerce employees; employees are protected from such coercion when manifested in words, oral or written. *N. L. R. B.* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477–478; *N. L. R. B.* v. *Schaefer-Hitchcock Co.,* 131 F. (2d) 1004, 1007 (C. C. A. 9); *N. L. R. B.* v. *New Era Die Co.,* 118 F. (2d) 500, 505 (C. C. A. 3); *N. L. R. B.* v. *Chicago Apparatus Co.,* 116 F. (2d) 753, 756–757 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *N. L. R. B.,* 116 F. (2d) 760, 766 (C. C. A. 7); *N. L. R. B.* v. *Federbush Co.,* 121 F. (2d) 954, 957 (C. C. A. 2).

2. *Respondent's discriminatory discharge of Leo Archibald*

Archibald was employed by respondent as a truck mechanic and welder at Pocatello from January 1941 to November 14, 1941, on which date he and the Pocatello drivers were discharged (R. 219, 412–413, 421). During the period of his employment Archibald's wages were increased from 50 to 60 cents per hour (R. 658).

At the time of his discharge, Archibald was one of the outstanding Union proponents. Although, as a

mechanic, he was ineligible for membership in the Union, he occupied a leading role in the drivers' organizational campaign which culminated in their decision to affiliate with the Union (R. 415–416). In fact, Archibald arranged for the Union organizer to address the drivers (R. 417).[24] After the drivers' affiliation with the Union he continued to participate in their union activities, soliciting memberships and collecting initiation fees and dues in the plant outside working hours, and attending several Union meetings (R. 418–420, 564, 596–597, 684, 685–687, 690). In view of the widespread character of Archibald's activities, many of which took place in the plant, and the smallness of the plant, the Board properly inferred (R. 54, 99) that respondent had full knowledge of Archibald's Union activities. *N. L. R. B.* v. *Abbott Worsted Mills,* 127 F. (2d) 438, 439 (C. C. A. 1).[25]

On November 14, Archibald, after reporting for work, was peremptorily discharged without prior notice or warning (R. 421). Respondent set forth as the ground for the discharge Archibald's frequent absence from work (R. 421, 423). During the hearing respondent sought to substantiate this assertion by pointing out that he was absent from work 37 days, including 25 Sundays, during the 10-month tenure of his

[24] In the latter part of October or early part of November 1941, Archibald joined the International Association of Machinists, Local 198, which was then organizing respondent's mechanics (R. 414, 418, 432).

[25] Significantly, Kermit Rice, Archibald's foreman (R. 331), inquired of him concerning the Union affiliation of the Pocatello drivers (R. 450).

employment (R. 657). The record, however, discloses that respondent's mechanics did not have fixed hours of work, being subject to call at any hour of the day or night, including Sundays and holidays (R. 427, 851–852, 874–875), and that it was customary, insofar as possible, for mechanics to have every other Sunday off (R. 427, 852). Further, it was the accepted procedure for mechanics who normally worked more than 40 hours a week as Archibald did (R. 427–430),[26] to "lay off" an "extra day" (R. 852–853). This "extra day" could be taken at any time, either in the middle of the week or in combination with a free Sunday (*ibid.*). In either case it was unnecessary to secure respondent's permission beforehand (*id.*).

A comparison of Archibald's work record with those of his fellow mechanics establishes that he absented himself from work no more frequently than they. Illustrative of this fact are the respective records of Mechanics Boyer and Thomas: Boyer was absent 16 days, including 9 Sundays, over a 3-month employment period between June 1 and August 23, 1941, and Thomas was "off" 8 days, including 5 Sundays, between September 3 and November 13 (R. 1071, 1072). Upon all these facts the Board properly rejected (R. 54) respondent's contention that Archibald's discharge was based on his absences during his 10-month period of employment.

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[26] Archibald worked an average of 9 to 9½ hours per day, 7 days a week, during the entire period of his employment (R. 427–430, 438–440).

Equally unavailing as a justification for Archibald's discharge is respondent's reference during the hearing to an incident that had occurred the preceding June, more than 5 months before the discharge. On that occasion, Archibald, while welding a gasoline tank, burned a small hole in the tank (R. 442–444, 451–452). Patently, as the Board found (R. 53–54), this "minor dereliction," antedating the discharge by more than 5 months, "was not the motivating cause for the discharge."[27] Nor can respondent point to Archibald's admitted slowness on an occasion some 8 or 9 months before the discharge (R. 426–427) as a basis for its action. The Board credited Archibald's testimony that since that time he had not been reprimanded on this account (R. 426, 442).

Highlighting the discriminatory character of respondent's discharge of Archibald is the fact that Archibald, who was active in organizing the truck drivers at Pocatello, was discharged the very day that their employment was terminated. Respondent sought to avoid the implications arising out of their simultaneous discharge by attempting to show that the decision to discharge Archibald was made prior to November 14, but not later than November 10, the

[27] Further attempting to justify its discharge of Archibald, respondent sought to show that several times he appeared at work intoxicated. The Board, carefully detailing the evidence (R. 98–105), rejected respondent's inconsistent and varying testimony and accepted Archibald's denial of the charge (R. 421, 444, 445, 466). It would serve no useful purpose at this time to repeat the testimony set forth in the Board's decision.

date of his last alleged "dereliction."[28] That "this position is untenable," as the Board found (R. 54–55), is demonstrated not only by the many inconsistencies in the testimony of respondent's witnesses as to when Archibald's discharge was determined, but by the absence of a consistent explanation as to why respondent selected November 14. Foreman Rice first testified that he had to wait until they "caught up" with their work (R. 877, 879). On the other hand, Sub-foreman Brown, as well as Rice himself, admitted that their mechanics were as busy as ever at the time of Archibald's discharge (R. 897, 846, 849). Rice later shifted his testimony stating that he was compelled to wait until he found another mechanic (R. 877–878). The falsity of this latter assertion is clear; it is not only undisputed that mechanics were available between November 10 and 14, but that respondent waited until November 20, 6 days after the discharge, before replacing Archibald (R. 878).

In conclusion, it is plain that Archibald, a prime mover in the drivers' organizational campaign, was summarily discharged the same day as the drivers whom he was instrumental in organizing. In the light of respondent's pattern of anti-unionism, coupled with

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[28] See footnote 27, *supra*. Foreman Rice testified that on November 10 he reprimanded Archibald for appearing at work with a so-called "belly ache," which, in Rice's opinion, was caused by drinking (R. 871, 879). The Board, carefully reviewing the testimony, credited Archibald's denial that he had been drinking or that he had been reprimanded (R. 54–55).

its inability to advance a credible explanation for his discharge, the Board was entitled to conclude (R. 104) that the real reason for his discharge was respondent's desire to eliminate all of the Union's supporters.

3. *The discriminatory discharge of Wayne Douglas*

Douglas was first employed by respondent in January 1940, as a truck driver, and stationed at Baker, Oregon (R. 535–536). In September 1941 he was transferred to Pocatello (R. 537–538), where, on September 29, he joined the Union (R. 538–539, 586, 244). Shortly thereafter he was retransferred to Baker (R. 539), where he was working at the time of his discharge on November 20, 1941 (R. 542). On that date he was peremptorily discharged by Bert Stiff's secretary,[29] Mrs. Stiff, who instructed Douglas "not to pull any more trips, and not to ask any questions" (R. 543).

Respondent contended before the Board that Douglas was discharged because of an accident in which he was involved at Weiser, Idaho, on October 16, 5 weeks before the discharge (R. 787–789, 540–541). This contention is directly refuted by the record. In the first place, on October 29, as soon as the truck involved in that accident was repaired and put back into service, Douglas resumed work, driving continuously until his discharge (R. 540–543, 861). As the

[29] The operations at Baker were under the supervision of Stiff (R. 216, 536, 626, 861, 957).

Board properly found (R. 55–56), had respondent discharged Douglas because of the Weiser accident it would not have delayed 5 weeks before acting. Moreover, at the time of Douglas' discharge by Mrs. Stiff, no reference was made to the Weiser accident. In fact, when Douglas went to Pocatello a day or two after the discharge, and asked General Manager Gilbert Moyle and Secretary Copening for an explanation, he was told that "he was fired for the same reason as the rest of the drivers were, on account of the insurance was cancelled" (R. 543, 545–547).

It is plain from the above summary of the Board's findings of fact that the Weiser accident to which Douglas' discharge was belatedly attributed was resurrected to serve as an "excuse" for ousting a Union member [*N. L. R. B.* v. *Blanton Co.,* 121 F. (2d) 564, 570 (C. C. A. 8)], especially since "[it was] not mentioned as such at the time of discharge" (*Hamilton Brown Shoe Co.* v. *N. L. R. B.,* 104 F. (2d) 49, 53 (C. C. A. 8). See also *N. L. R. B.* v. *Tovrea Packing Co.,* 111 F. (2d) 626, 629 (C. C. A. 9), cert. denied 311 U. S. 668; *N. L. R. B.* v. *National Casket Co.,* 107 F. (2d) 992, 997–998 (C. C. A. 2).

Respondent, attempting to avoid the consequences of its discriminatory action, argued that since five other drivers who belonged to a Teamster's local other than the charging union, continued in respondent's employment at Baker (R. 543–544), the Board was foreclosed from finding a violation of Section 8 (3) with respect to Douglas. Respondent's argument

misconceives the basis of the Board's decision; the Board found (R. 56–57) that Douglas was selected for discharge because he was identified by respondent with a particular union, "the Pocatello group." The Circuit Courts of Appeals, rejecting similar contentions, have repeatedly held that an inference of discrimination is not necessarily rebutted by a showing that the employer has not discriminated against other union members. *N. L. R. B.* v. *Superior Tanning Co.*, 117 F. (2d) 881, 889 (C. C. A. 7), cert. denied 313 U. S. 559; *N. L. R. B.* v. *Luxuray, Inc.*, 123 F. (2d) 106, 108–109 (C. C. A. 2); cf. *N. L. R. B.* v. *Aladdin Industries*, 125 F. (2d) 377, 384–386 (C. C. A. 7), cert. denied 316 U. S. 706.

Point II

The Board's order is valid

The Board's order (R. 61–65) is in the usual form upon the findings made. In addition to the normal cease and desist provisions, it requires respondent to withdraw recognition from and disestablish the Association, to cease giving effect to the contract of June 1, 1942, with the Association, to reinstate with back pay all of the employees listed in Appendix "B,"[30]

[30] The Board found that drivers Cornia, Henricksen, Merrill, Douglas, and Whitesides were discriminatorily discharged (R. 59–60). Since they had been involved in serious accidents (see p. 20, *supra*), however, the Board (R. 60), exercising its administrative discretion as to the proper means of effectuating the purposes of the Act, did not require their reinstatement nor award them back pay.

and to award back pay to R. E. Miller for the period during which he suffered discrimination (R. 64). As previously noted (p. 14, footnote 15 *supra*), Miller, subsequent to his discriminatory discharge, was reinstated as a truck driver.

No proper issue is raised by respondent's contention (R. 895–896) that the Board was precluded from directing the reinstatement of 4 of the discharged drivers [31] since they were "extra board" (temporary) drivers who would, absent discrimination, nevertheless have been discharged that same winter. The Board's order merely requires the reinstatement of the employees discriminated against to their former or substantially equivalent positions in the event that such positions are available, and awards back pay only for those periods during which they would have worked, absent discrimination. Cf. *N. L. R. B.* v. *Nelson Mfg. Co.,* 120 F. (2d) 444, 446 (C. C. A. 8); *N. L. R. B.* v. *Planters Mfg. Co.,* 106 F. (2d) 524 (C. C. A. 4); *N. L. R. B.* v. *Wilson Line,* 122 F. (2d) 809, 813–814 (C. C. A. 3). But in any event, as the Board found (R. 59), respondent's contention is not borne out by the instant record. It is undisputed that by November 20, within 6 days of the discharge of the 18 Pocatello drivers, including the 4 in question, all the drivers were replaced (R. 901), and that from that date to March 28, 1942, the number of drivers employed at Pocatello averaged 19 (R. 220–221).

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[31] Guy Campbell, Howard Davis, John Roy, and Leland Stanford.

Equally without merit is respondent's further objection to the order of reinstatement based upon its offer to reinstate several of the drivers to employment as loaders on the loading dock (R. 909–917).[32] It is clear from the record (R. 902) that, wholly aside from the disparity in earnings between the two types of employment,[33] the nature of the duties and the skill required in each are materially different. Accordingly, the Board properly concluded that respondent's offer did not constitute an offer of substantially equivalent employment (R. 58–59). See *Polish National Alliance* v. *N. L. R. B.,* 136 F. (2d) 175 (C. C. A. 7), certiorari denied with respect to this point 64 S. Ct. 60; cf. *N. L. R. B.* v. *Carlisle Lumber Co.,* 99 F. (2d) 533, 539 (C. C. A. 9), cert. denied 306 U. S. 646; *Mooresville Cotton Mills* v. *N. L. R. B.,* 110 F. (2d) 179, 180–181 (C. C. A. 4).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue en-

[32] Of the drivers ordered reinstated by the Board, only one, K. C. Brower, accepted respondent's offer of employment as a dockloader, which job he held from about December 18, 1941, until he left respondent's employment in February 1942 (R. 914–915).

[33] The Board found (R. 58, footnote 11) that, assuming the testimony of respondent's witness, Foreman Henninger, to be correct, a dockloader would earn about $158.60 per month, as compared with $175 per month then being paid to respondent's drivers (R. 902).

forcing said order in full as prayed in the Board's petition for enforcement.

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FEBRUARY 1944.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

> SEC. 2 (2). The term "employer" includes any person acting in the interest of an employer, directly or indirectly, * * *.
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

APPENDIX B

Leo Archibald
James Ayers
K. C. Brower
S. R. Burkholder
Guy Campbell
Howard Davis
Victor Ellingford
John Evans
Leonard Fowler
Arthur Heckert
Carl Hill
John Ray
Leland Stanford
P. P. Stanger

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